

OPERATIONS MEMO

For Public Release

No. : 1071

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**SUBJECT: REGISTRATION AND SECURITY POLICY FOR:
LIMITED LIABILITY COMPANIES (LLC)
LIMITED LIABILITY PARTNERSHIPS (LLP)
UNINCORPORATED BUSINESS ORGANIZATIONS (UBO)**

I. GENERAL

This Operations Memo supercedes Operations Memo No. 1026.

II. LIMITED LIABILITY COMPANIES (LLC)

A. INTRODUCTION

Effective September 30, 1994, Senate Bill 469 (Beverly), Chapter 1200, authorized the formation of a new business entity called a limited liability company, that can afford its members the same legal liability protection as shareholders of a corporation. A limited liability company (LLC) shares characteristics of that afforded to both partnerships and corporations. LLC's formed under California statutes are domestic LLC's, and LLC's formed under the laws of another state or a foreign country are foreign LLC's. A domestic or foreign LLC may not render professional services in California which may lawfully be rendered only under a license, certificate, or registration authorized by the Business and Professions Code or Chiropractic Act.

Domestic LLC's are required to register with the Secretary of State and must file Articles of Organization (LLC-1) which set forth the name of the LLC, statement of purpose, name and address of agent for service of process, and a statement as to how the LLC is to be managed. Foreign LLC's which "transact intrastate business" as defined in Corporations Code Section 17001 (Attachment A) must file an Application for Registration (LLC-5) with the Secretary of State, but foreign LLC's which do not "transact intrastate business" are not required to register with the Secretary of State. This should not be confused with the definition of "retailer engaged in business in this state" under Revenue and Taxation Code Section 6203 which remains a determining factor for district offices to decide whether a foreign LLC is making taxable sales in California.

Domestic LLC's are required to have at least two members but foreign LLC's may have only one member. The Articles of Organization of a domestic LLC will provide that the LLC will be managed by one manager, more than one manager, or the LLC members who may, but need not, be natural persons. If no manager(s) is designated, management is vested with the members. A manager's fiduciary duties to the LLC and its members are those of a partner to a partnership. If the LLC has a manager(s), a member acting as such is not an agent of the LLC and cannot bind it

II. LIMITED LIABILITY COMPANIES (LLC) (Cont.)

or execute instruments on its behalf. However, this member could be responsible for taxes under R & T Code Section 6829.

A. INTRODUCTION (Cont.)

In addition to managers and members, an LLC may have officers, each of whom may, but need not, be a member or manager. Appointment of officers shall be specified in the written operating agreement or if no provision is made in the operating agreement, officers may be appointed by a manager(s). Regular meetings of members or managers are not required unless expressly called for in the Articles of Organization or operating agreement.

Upon registration with the Secretary of State, SB 469 authorizes both foreign and domestic LLC's to transact business in this state. Therefore, Revenue and Taxation Code Section 6005 was amended by this legislation to include limited liability company in the definition of "person". Additionally, R & T Code Section 6829 provides that upon termination, dissolution, or abandonment of a domestic or foreign LLC business, any officer, member, manager, or other person having control or supervision of, or is charged with the responsibility for the filing of returns or the payment of tax, or is under a duty to act for the LLC in complying with any requirement (of filing returns or payment of taxes) shall be personally liable for any unpaid taxes and interest and penalties on those taxes, if the officer, member, manager, or other person willfully fails to pay or to cause to be paid any taxes due from the LLC. This legislation also provides that both the Secretary of State and the Franchise Tax Board shall have the authority to suspend the powers, rights, and privileges of an LLC for failure to comply with certain provisions of the Corporations Code and the Revenue and Taxation Code respectively.

The Articles of Organization of a domestic LLC (LLC-1), and the Application for Registration of a foreign LLC (LLC-5) do not include the names of managers and members. Accordingly, the applicant must provide all required information regarding responsible managers and members at the time of registration. The best source for manager/member information is the Secretary of State's Limited Liability Company - Statement of Information, Form LLC-12, which requires the name of each manager or, if none, the name of each member, and the name of the executive officer(s), if any. The form must be filed with the Secretary of State within 90 days of the initial filing of the articles of organization and annually thereafter. If the applicant has the LLC-12 but it has not been filed with the Secretary of State as evidenced by the Secretary of State's bar code or official stamp and LLC number in the bottom right hand corner of the form, the applicant should be instructed to send us a copy of the form after it has been filed. If the applicant does not provide a copy of the LLC-12 within 90 days, a copy of the LLC-12 should be obtained by contacting the Secretary of State's LLC Unit, P.O. Box 944228, Sacramento, CA 94244-2280, telephone (916) 653-3795. Note: The Secretary of State's office does not routinely follow-up to obtain the LLC-12 so the form may not always be available.

II. LIMITED LIABILITY COMPANIES (LLC) (Cont.)

B. COMPLETING THE APPLICATION

The BOE-400-MCO will be used to issue seller's permits. Use the appropriate application form for other tax programs. To minimize confusion, the tax technician should ascertain the type of ownership prior to providing the taxpayer with an application and assist the taxpayer in completing the BOE-400-MCO. The Articles of Organization (Form LLC-1 for domestic LLC's or Form LLC-5 for foreign LLC's) should accompany applications. The LLC form must have the Secretary of State's bar code and LLC number at the lower right-hand corner of the form.

Application Form BOE-400-MCO will be used to register a single LLC as the permittee. Check Limited Liability Company (LLC) as the type of ownership in Box One. Enter the full LLC name as it appears on the Articles of Organization in Box Two. Box Three will be completed as usual. Enter the LLC number in Box Four and identify accordingly. Boxes Five through Eleven will be used for information about responsible managers or, if none, members. Use additional sheets as necessary to list additional responsible managers or members and officers.

If a manager or member is other than a natural person, i.e., a corporation, enter the name on Line Five, the BA on Line Number Six and skip Lines Seven, Nine and Ten (see Attachment A). Use a separate sheet to list corporate number and officer information in these situations. The balance of the application should be completed as usual and all applications need to be signed by the responsible officers.

When registering a partnership between an LLC and another entity, such as a corporation, use an additional application Form BOE-400-MCO. Attach a separate sheet to include information on additional partners, including the respective responsible managers, members, and/or corporate officers of each partner entity.

C. ON-LINE REGISTRATION PROCEDURE

Refer to the Client/Taxpayer System User's Guide, page 5-22, for instructions. For LLCs, the relationship code for managers is B and the code for members is G. Officers can not be related to an LLC. They are to be listed as managers and the appropriate comments recorded.

D. ACCOUNT MAINTENANCE ISSUES

As with corporations, a change of the responsible managers or members does not change the ownership entity, the LLC. Every effort should be made to keep current information on the responsible managers or members. If contacting the business does not provide this information, the Secretary of State's Office may have a Certificate of Amendment (LLC-2 and LLC-6), Restated Articles of Organization (LLC-10), Certificate of Correction (LLC-011), Certificate of Dissolution (LLC-3), and Certificate of Continuation (LLC-8), Certificate of Cancellation (LLC-4/7) Certificate of Merger (LLC-9), and Resignation of Agent for Service of Process (LLC-100). A Statement of Information filed for subsequent years is filed on a LLC-12R.

II. LIMITED LIABILITY COMPANIES (LLC)

D. ACCOUNT MAINTENANCE ISSUES (Cont.)

A limited liability company shall be dissolved and its affairs shall be wound up upon the happening of the first to occur of the following:

- a) At the time specified in the articles of organization, if any, or upon the happening of events, if any, specified in the articles of organization or a written operating agreement.
- b) By the vote of a majority in interest of the members, or a greater percentage of the voting interests of members as may be specified in the articles of organization or a written operating agreement.
- c) Entry of a decree of judicial dissolution pursuant to Corporation Code Section 17351.

Districts should be cognizant of these events when conducting routine account maintenance, or when an LLC is being worked for a delinquency/accounts receivable/revocation or bankruptcy.

E. SECURITY

Security deposits should be routinely required from all LLC's. In cases when there are circumstances which the District Office Compliance Supervisor feels security is not mandatory, complete notes should be made in Registration Comments explaining the reason for waving the security requirement. The LLC must be on the security. Any responsible officer, member, manager, or other person as indicated in Section 6829 may also, but is not required to be, listed on a surety bond or deposit account. Any change of those individuals listed on a surety bond should be corrected with a rider.

III. LIMITED LIABILITY PARTNERSHIPS (LLP)

A. INTRODUCTION

A limited liability partnership (LLP) is a general partnership, not a limited partnership, which provides its partners with limitations on their personal liability (without changing most of the attributes of a general partnership), which is licensed to engage in the practice of law or public accountancy or architecture, or is a partnership "related" to a LLP, which provides facilities or services to a LLP or provides services related to, or complementary to, services provided by the LLP. The domestic registered LLP, as well as the foreign LLP, which will "transact intrastate business" must register with the California Secretary of State by filing a Registered Limited Liability Company Registration, LLP-1. Corporations and other collective entities, such as partnerships, can be partners of an LLP.

B. COMPLETING THE APPLICATION

Form BOE-400-MCO is used. In Section I, 1. The "Other" box should be checked and described as Limited Liability Partnership or LLP. In Section I, 2. The name of the LLP, exactly as registered with the Secretary of State except for the end of the name, is to be listed. General partners and/or managing general partners are to be identified on the form

III. LIMITED LIABILITY PARTNERSHIPS (LLP) (Cont.)

by a notation in the description box above each column for the partner's individual information.

Form BOE-400-MCO will be revised to better accommodate LLPs. A copy of Secretary of State Form LLP-1 should accompany the BOE-400-MCO.

C. ON-LINE REGISTRATION PROCEDURE

For BOE identification purposes until registration codes are established, LLP is to be listed at the end of the LLP name. The actual end, Registered Limited Liability Partnership, Limited Liability Partnership, R.L.L.P., L.L.P., RLLP, or LLP is to be noted in on-line comments. The remaining information required by the form should be completed. Register the LLP as a partnership following the procedures in Chapter Six of the Client/Taxpayer System User's Guide. Use entity code P and be sure to list the LLP name on the name line with LLP at the end. Remember to list the LLP's FEIN or SEIN and Secretary of State number.

D. ACCOUNT MAINTENANCE ISSUES

If one of the partners of the LLP changes, the LLP entity does not change as long as there are at least two or more partners. Every effort should be made to keep current information about the LLP's partners. Possible sources of Secretary of State information for changes may be found in an Amendment to Registration, LLP-2, and also a Change in Status, LLP-4.

New owner and entity codes will be developed to accommodate the information for LLPs. Current accounts will be converted by Headquarters. Assistance from field offices may be required on a case by case basis.

E. SECURITY

Security deposits should be routinely required from all LLP's. In cases when there are circumstances which the District Office Compliance Supervisor feels security is not mandatory, complete notes should be made in Registration Comments explaining the reason for waving the security requirement. The LLP name must be on the security. Any partner or other person as indicated in Section 6829 may also, but is not required to be, listed on a surety bond or deposit account. Any change of those individuals listed on a surety bond should be corrected with a rider.

IV. UNINCORPORATED BUSINESS ORGANIZATIONS (UBO)**A. INTRODUCTION**

Revenue and Taxation Code Section 6005 defines "person" to include "trust" and "business trust." Unincorporated Business Organizations are trusts between a beneficiary, who only contributes assets, does not control the business, and is not liable for tax debts of a business, and a trustee(s), who manages the contributed assets of the beneficiary, who may operate a business initially funded by contributed assets of the beneficiary and who would be responsible for tax debts. A UBO must have at least one trustee.

The beneficiary can not be the trustee and the contributed assets must be in the total control of the trustee with no ability by the beneficiary to access those assets or control the business. An agreement to create an Unincorporated Business Organization in California must utilize a written declaration of trust or other instrument in a written agreement defining the rights and responsibilities between the beneficiaries and the trustee(s). If the declaration, agreement, or other discovery shows that the trustee(s) or the business may be in any way controlled by the beneficiary, the business is not a trust and the beneficiary is liable as a partner.

Other than the written agreement, the structure of a UBO may consist of nothing more than a bank account in the name of the UBO, or if the UBO has no name, in the name of the trustee "as trustee." Or, the UBO may have a structure more like a corporation where the UBO issues beneficiary's transferable shares of stock. The UBO's real and personal property should be held in the name of the trustee, as trustee of the UBO.

The UBO's trustees are the entity's "principals." The beneficiaries are not "principals" of the UBO and have no liability for taxes due by the UBO. The UBO and its trustee are jointly liable for any taxes due. If the Board cannot collect from the UBO's assets, collection efforts can be directed toward the trustee. For tax liability purposes, there is no limit to a trustee's liability.

B. COMPLETING THE APPLICATION

Form BOE-400-MCO should be used. A copy of the written agreement should be submitted with the application form.

C. ON-LINE REGISTRATION PROCEDURE

If a written agreement is not provided establishing the requirements for a Seller's Permit to be issued to the entity as an Unincorporated Business Organization, the entity should not be issued a permit as an Unincorporated Business Organization. In the absence of a written agreement, the Board should assume the entity is a general partnership and may issue a permit to the entity as a general partnership.

If the taxpayer provides a written agreement establishing the requirements for a UBO, a permit is to be issued in the name of the UBO and the trustee(s). If the UBO has no name, the permit should be issued in the name of the trustee(s) "as trustee(s)."

For UBOs, the entity code is B, the owner code is B, the relationship code for the beneficiary is B, and the relationship code for the trustee is T.

D. ACCOUNT MAINTENANCE ISSUES

Use the procedures for a sole proprietorship.

E. SECURITY

If the Board requests security on a UBO account, it is to be posted by the trustee(s) as an individual(s). The trustee and the name of the UBO are required to be listed on a surety bond if a written agreement establishes the name of the UBO.

V. OBSOLESCENCE

This operations memo will be obsolete when it is included in the appropriate manuals.

J. E. Speed
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Distribution: 1-D

Attachments